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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Renee Cecala,) No. CV 04-2612-PHX-NVW
10 Plaintiff,) **ORDER**
11 vs.)
12)
13 David B. Newman, et al.,)
14 Defendant.)
15

16 This court addresses: (1) Defendant Rubinstein's Motion to Dismiss for lack of
17 personal jurisdiction, insufficient service of process, and failure to state a claim upon which
18 relief may be granted (Doc. #29); (2) Defendants Cooperman, Levitt, Winikoff, Lester, and
19 Miller's Motion to Dismiss for lack of personal jurisdiction and failure to state a claim (Doc.
20 #28); and (3) Defendants Newman and Cooperman-Levitt's Motion to Dismiss for failure to
21 state a claim (Doc. #27).

22 **I. Background**

23 Plaintiff Renee Cecala, a North Carolina resident at the time, contacted David Newman
24 of Cooperman-Levitt, a New York law firm, to discuss potential claims against her employer,
25 NationsBank. Doc. #3 at ¶11. After an initial consultation, Cecala retained Cooperman-
26 Levitt in January 1997 to advise her about any employment discrimination claims she had
27 against NationsBank. Doc. #3 at 13. Rubinstein, an associate attorney at Cooperman-Levitt,
28 was assigned to Cecala's case and worked on it between approximately June 1997 and June

1 1998. Doc. #3 at ¶19, Doc. #29 at 2. North Carolina law governed Cecala's case. Doc. #3
2 at 38. In June 1997, Cecala moved her domicile from North Carolina to Arizona. Doc. #3
3 at ¶18. As part of the representation, Rubinstein communicated with Cecala in Arizona by
4 telephone, mail, e-mail, fax, and Federal Express. Doc. #45, Exhibit 1. On one occasion,
5 Rubinstein asked Cecala to notarize the NASD Uniform Submission Agreement and a
6 revised Statement of Claim. *Id.* In June 1998, Rubinstein ceased working for Cooperman-
7 Levitt. Doc. #29, Rubinstein affidavit.

8 Defendants Cooperman, Levitt, Winikoff, Lester, and Miller were partners at
9 Cooperman-Levitt. Cecala alleges that these defendants knew about Newman's sexual
10 relationship with Cecala, they failed to intercede, and they therefore breached ethical duties
11 in New York. Doc. 46, Exhibit 1. In addition, she asserts that Cooperman-Levitt put an
12 improper lien on any damages she recovered from NationsBank. *Id.*

13 In June 1999, Cecala terminated Cooperman-Levitt's representation of her. Doc. #47,
14 at 4. In February 2000, Cecala received an adverse arbitration decision, which she
15 unsuccessfully sought to vacate in federal court. *Id.* Ultimately, the Fourth Circuit denied
16 Cecala's motion for re-hearing en banc, and she chose not to file a petition of certiorari to the
17 Supreme Court, due November 21, 2002. *Id.* at 4-5. On November 21, 2004, Cecala sued
18 all the defendants for legal malpractice, breach of fiduciary duty, and constructive fraud for
19 conduct during the course of their attorney-client relationship.

20 **A. Personal Jurisdiction**

21 **1. Legal Standard**

22 A plaintiff has the burden of proving "that jurisdiction is appropriate, but in the
23 absence of an evidentiary hearing, the plaintiff need only make a prima facie showing of
24 jurisdictional facts." *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990). Rubinstein and
25 Cecala do not dispute any facts regarding Rubinstein's contacts with her in Arizona.
26 However, Cecala and Cooperman, Levitt, Winikoff, Lester, and Miller disagree about
27 whether those defendants had knowledge of her alleged improper sexual relationship with
28 Newman. For the purposes of this decision, the court will assume that Cooperman, Levitt,

1 Winikoff, Miller, and Lester knew about the sexual relationship between Cecala and
2 Newman.

3 When a defendant seeks dismissal for lack of personal jurisdiction, a federal court
4 applies the law of the state in which the district court sits. *See* Fed. R. Civ. P. 4(k)(1)(A).
5 Arizona's long-arm statute allows Arizona courts to assert jurisdiction to the full extent of the
6 Due Process Clause. Ariz. R. Civ. P. 4.2(a). Because Arizona's long-arm jurisdictional
7 statute is coextensive with federal due process requirements, "[t]he jurisdictional issue . . .
8 hinges on federal law." *Uberti v. Leonardo*, 181 Ariz. 565, 569, 892 P.2d 1354, 1358 (1995).
9 Thus, jurisdiction in this case is constrained only by constitutional principles.

10 To sustain personal jurisdiction over a defendant, a plaintiff must show that the
11 defendant has "'minimum contacts' with the relevant forum such that the exercise of
12 jurisdiction 'does not offend traditional notions of fair play and substantial justice.'"
13 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) (citing
14 *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). There are two types of
15 personal jurisdiction: general jurisdiction and specific jurisdiction. *Id.* at 801-03. When
16 evaluating either general or specific personal jurisdiction, "the constitutional touchstone
17 remains whether the defendant purposefully established 'minimum contacts' in the forum
18 state." *Burger King Corp. v. Radzewicz*, 471 U.S. 462, 474 (1985).

19 Cecala has no grounds for general personal jurisdiction over Defendants Rubinstein,
20 Cooperman, Levitt, Winikoff, Lester, and Miller.¹ Therefore, Cecala must look to specific
21 personal jurisdiction. The Ninth Circuit established a three-prong test for whether a
22 defendant has sufficient "minimum contacts" with a state for specific personal jurisdiction
23 over him. First, "[t]he non-resident defendant must purposefully direct his activities or
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25 ¹Cecala asserts that this court has general personal jurisdiction over Rubinstein
26 because he engaged in unauthorized practice of law. That argument is meritless, as
27 Rubinstein did not engage in unauthorized practice of law in Arizona by communicating with
28 his client in her state of domicile, concerning his representation of her in a state other than
Arizona.

1 consummate some transaction with the forum or resident thereof; or perform some act by
2 which he purposefully avails himself of the privilege of conducting activities in the forum,
3 thereby invoking the benefits and protections of its laws." *Schwarzenegger*, 374 F.3d at 802.
4 Second, "the claim must be one which arises out of or relates to the defendant's forum-related
5 activities." *Id.* Third, "the exercise of jurisdiction must comport with fair play and
6 substantial justice, i.e. it must be reasonable." *Id.* The plaintiff bears the burden of satisfying
7 the first two prongs of the test, and then "the burden shifts to the defendant to present a
8 compelling case that the exercise of jurisdiction would not be reasonable." *Id.*

9 **2. Jurisdiction Over Rubinstein**

10 Cecala alleges that the following contacts are sufficient to support specific personal
11 jurisdiction over Rubinstein in Arizona: mail sent to her in Arizona; telephone calls to her
12 in Arizona; faxes directed to her in Arizona; e-mails sent to her in Arizona; and a Federal
13 Express package containing the agreement to arbitrate, which she notarized in Arizona.

14 The question before the court is whether communications between an attorney and an
15 out-of-state client satisfy the Due Process Clause's "minimum contacts" requirement. Cecala
16 necessarily asks this court to hold that an attorney with an out-of-state client is subject to
17 personal jurisdiction in the state in which his client is domiciled. This contention is in error.
18 The bare existence of an attorney-client relationship for a representation outside the client's
19 state is insufficient for personal jurisdiction over the attorney in the client's state.

20 In *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990), the Ninth Circuit addressed
21 this very issue—whether the courts of the client's state has personal jurisdiction over an out-
22 of-state attorney-defendant for professional negligence not in the client's state. The *Sher*
23 clients sued the attorneys and the partnership for legal malpractice and various other torts.
24 *Id.* at 1362. In deciding whether the court had personal jurisdiction over the partnership, the
25 *Sher* court stated that it "must look to prior negotiations and contemplated future
26 consequences, along with the terms of the contract and the parties' actual course of dealing
27 to determine if the defendant's contracts are *substantial* and not merely random, fortuitous,
28 or attenuated." *Id.* at 1362 (internal quotations omitted) (emphasis in original). In addition,

1 the court provided that "normal incidents" of representation do not "establish purposeful
2 availment." *Id.* at 1362-63. "Out-of-state legal representation does not establish purposeful
3 availment of the privilege of conducting activities in the forum state, where the law firm is
4 solicited in its home state and takes no affirmative action to promote business within the
5 forum state." *Id.* The *Sher* court concluded that it lacked personal jurisdiction over the
6 individual attorneys in the partnership even though the attorney-defendants telephoned the
7 client-plaintiffs in California, one partner traveled to California to meet with the clients, they
8 sent mail to the clients in California, and the clients executed a deed of trust on real estate
9 located in California to pay for attorneys' legal services. *Id.* at 1366. Such conduct by the
10 attorneys did not amount to purposeful availment.

11 In this case, Cecala asserts that Rubinstein's telephone calls, e-mails, and faxes to her,
12 combined with her notarizing in Arizona the agreement to arbitrate in North Carolina, satisfy
13 the purposeful availment requirement. *Sher* holds otherwise. Cecala does not demonstrate
14 that Cooperman-Levitt or Rubinstein took any "affirmative action to promote business"
15 within Arizona. Cecala contacted Newman at Cooperman-Levitt, a New York law firm, to
16 represent her in a case governed by North Carolina law while she lived in North Carolina.
17 Cecala moved to Arizona after the attorney-client relationship began. In addition,
18 Rubinstein has fewer contacts with Arizona than the *Sher* defendants had with California,
19 and those contacts were insufficient to establish that the individual attorneys purposefully
20 availed themselves of California law. Therefore, Rubinstein did not purposefully avail
21 himself of Arizona law.

22 **3. Jurisdiction Over Cooperman, Levitt, Winikoff, Lester, and Miller**

23 Cecala argues that the following contacts are sufficient for this court to assert specific
24 personal jurisdiction over Cooperman, Levitt, Winikoff, Lester, and Miller: they knew of the
25 sexual relationship between her and Newman; Cooperman-Levitt improperly put a lien on
26 any recovery from NationsBank; and they committed ethical violations in New York because
27 of their failure to act.
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1 Cecala's claim of Arizona personal jurisdiction over Cooperman, Levitt, Winikoff,
2 Lester, and Miller is weaker than her claim over Rubinstein. Cecala does not provide any
3 examples of these defendants purposefully availing themselves of Arizona law. They did
4 not work on her employment case. They did not have any contact with Arizona. They did
5 not seek out clients in Arizona. Under *Sher*, an attorney-client relationship is not enough to
6 satisfy specific personal jurisdiction unless there are "substantial" contacts with the forum
7 state. Such contacts are not present here.

8 Therefore, this court lacks personal jurisdiction over Defendants Rubinstein,
9 Cooperman, Levitt, Winikoff, Lester, and Miller without violating their due process rights.
10 In addition, the court determines pursuant to Rule 54(b), Fed. R. Civ. P., that there is no just
11 reason for delay in entering final judgment of dismissal of these six defendants. Cecala's
12 case against Defendants Cooperman-Levitt and Newman could continue for a lengthy time,
13 and these defendants should not have to monitor these proceedings for what could be a long
14 time before obtaining repose. Moreover, the legal grounds upon which these defendants are
15 entitled to dismissal are independent of the issues between the remaining parties.

16 It is unnecessary to decide Rubinstein's defense of insufficient service of process or
17 Rubinstein, Levitt, Winikoff, Lester, and Miller's motion for dismissal for failure to state a
18 claim upon which relief can be granted.

19 **B. Statute of Limitations**

20 Defendants Newman and Cooperman-Levitt argue that Cecala fails to state a claim
21 because all of her claims are barred by Arizona's statute of limitations. The statute of
22 limitations is an affirmative defense, not a plaintiff's pleading requirement. *Wyatt v. Terhune*,
23 315 F.3d 1108, 1117 (9th Cir. 2003). A defendant may raise the statute of limitations in a
24 motion to dismiss "if the running of the statute is apparent from the face of the complaint."
25 *Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482, 484 n.1 (9th Cir. 1987).

26 Cecala's complaint does not establish that her claims are barred by the statute of
27 limitations, but she asks the court to take judicial notice of the fact that she brought an action
28 to vacate the arbitration award in federal court pursuant to 9 U.S.C. § 10. *Cecala v.*

1 *NationsBank Corp. et al.*, No. 3:00-mc-00039 (D. N.C. Apr. 4, 2001) (bringing a motion to
 2 vacate the arbitration award in the Eastern District of North Carolina); *Cecala v.*
 3 *NationsBank Corp.*, 40 Fed. Appx. 795, 796 (4th Cir. 2002) (upholding the district court's
 4 decision to deny Cecala's motion to vacate the arbitration award). Defendants do not object
 5 to the court taking judicial notice of the district and circuit court decisions, so this court
 6 possesses the necessary facts, between Cecala's complaint and the two cases of which the
 7 court takes judicial notice, to pose and to decide the narrow question of when Cecala's action
 8 for legal malpractice accrued and therefore the limitations period commenced.

9 On this state of the pleadings and the judicially noticed procedural facts, the court can
 10 determine whether *Amfac*'s accrual rule for legal malpractice committed during litigation also
 11 applies to legal malpractice arising in connection with arbitration. If the *Amfac* rule does not
 12 apply, Cecala's legal malpractice claim accrued at the time of the negligence, subject to
 13 possible tolling by other events. None of the other statute of limitations issues that
 14 defendants urge are properly presented in this Motion to Dismiss.

15 **1. Discussion**

16 In 1983, the Arizona courts addressed when the statute of limitations begins to run in
 17 an action for legal malpractice committed in litigation. *See generally Amfac Distrib. Corp.*
 18 *v. Miller*, 138 Ariz. 152, 673 P.2d 792 (1983) ("*Amfac I*"); *Amfac Distrib. Corp. v. Miller*,
 19 138 Ariz. 155, 673 P.2d 795 (Ariz. Ct. App. 1983) ("*Amfac II*"). In *Amfac I*, the Arizona
 20 Supreme Court concluded that "in legal malpractice cases, the injury or damaging effect on
 21 the unsuccessful party is not ascertainable until the appellate process is completed or is
 22 waived by a failure to appeal." 138 Ariz. at 154, 673 P.2d at 793. The Arizona appellate
 23 court articulated several reasons for this holding. First, without a final judgment, "the
 24 element of injury or damage remains speculative and remote" *Amfac II*, 138 Ariz. at
 25 156, 673 P.2d at 796. Second, clients may not be able to gauge whether an attorney has
 26 committed malpractice until the case's conclusion. *Id.* at 156, 673 P.2d at 796. Third,
 27 requiring a client to constantly second-guess his or her attorney's actions would impair the
 28

1 attorney-client relationship, a relationship based on trust and confidence. *Id.* at 156-57, 673
2 P.2d at 796-97.

3 More recently, the Arizona Supreme Court extended *Amfac* to causes of action for
4 legal malpractice in the course of criminal litigation. *Glaze v. Larsen*, 207 Ariz. 26, 27, 83
5 P.3d 26, 27 (2004). The *Glaze* court determined that *Amfac*'s policy reasons do apply and
6 that a claim against an attorney for malpractice occurring during the course of criminal
7 proceedings "does not accrue until the complete termination of the criminal proceedings."
8 *Id.* at 32, 83 P.3d at 32. The court reiterated the principles in *Amfac II* and articulated two
9 related reasons for extending *Amfac*. First, requiring plaintiffs to commence legal
10 malpractice actions at the point that they became aware of their attorney's negligence would
11 frequently force plaintiffs to seek out new counsel in the midst of litigation, further impairing
12 the attorney-client relationship. *Id.* at 30, 83 P.3d at 30. Second, the *Amfac* rule promotes
13 judicial efficiency because otherwise, courts might be deciding a legal malpractice case while
14 the initial litigation is pending on appeal. *Id.* at 30, 83 P.3d at 30.

15 While different rules govern arbitration proceedings and appeals, the same policy
16 reasons cited in *Amfac* and *Glaze* apply to legal malpractice claims stemming from negligent
17 representation in connection with arbitration. Until judicial review is exhausted or waived,
18 the injury is remote and speculative. Even though vacating an arbitration agreement may
19 prove more difficult than overturning a lower court's decision, the procedure is available and
20 a plaintiff might succeed. Likelihood of success should not be a factor in determining
21 whether *Amfac* applies to arbitration proceedings any more than it is in a judicially litigated
22 case. In addition, the attorney-client relationship could be harmed by commencing the statute
23 at the time the negligence occurred in the arbitration proceedings. Finally, the *Amfac* accrual
24 rule promotes judicial efficiency and provides litigants with a bright-line rule. As in *Glaze*,
25 to commence the running of the limitations period for a legal malpractice action at the time
26 of the negligence could compel the dilemma of a lower court deciding the malpractice issue
27 while the reviewing court has yet to uphold the underlying decision.

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1 The court concludes that the Arizona Supreme Court would apply the *Amfac* accrual
2 rule to legal practice in arbitration proceedings. Therefore, accrual of a legal malpractice
3 claim arising in arbitration begins when the judicial review of the arbitration award is
4 concluded and the "appellate process is completed or is waived by a failure to appeal."
5 *Amfac I*, 138 Ariz. at 153; 673 P.2d at 793.

6 **C. Rule 8(a)(2)**

7 Rule 8(a)(2) provides that a complaint contain "a short and plain statement of the
8 claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Cecala filed her
9 ninety-two page amended complaint without an attorney. However, she is now represented
10 by counsel, and her complaint needs to conform to Rule 8(a)(2)'s requirements. At oral
11 argument, Cecala's attorney informed the court that Cecala would submit a second amended
12 complaint. Therefore, on its own initiative, the court will dismiss her first amended
13 complaint (Doc. #3) for failure to comply with Rule 8(a)(2) with leave to amend in
14 conformance with that rule.

15 IT IS THEREFORE ORDERED that Defendant Rubinstein's Motion to Dismiss for
16 Lack of Personal Jurisdiction (Doc. #29) is granted.

17 IT IS FURTHER ORDERED that Defendant Cooperman, Levitt, Winikoff, Lester,
18 and Miller's Motion to Dismiss for Lack of Personal Jurisdiction (Doc. #28) is granted. In
19 addition, the court determines pursuant to Rule 54(b), Fed. R. Civ. P., that there is no just
20 reason for delay in entering final judgment of dismissal of these six defendants.

21 IT IS FURTHER ORDERED that the clerk is directed to enter final judgment
22 dismissing this action without prejudice as against Defendants Rubinstein, Cooperman,
23 Levitt, Lester, Winikoff, and Miller for lack of personal jurisdiction.

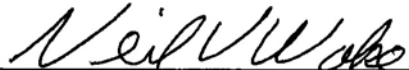
24 IT IS FURTHER ORDERED that Defendant Newman and Cooperman-Levitt's
25 Motion to Dismiss (Doc. #27) is denied on the merits as to the time of commencement of the
26 negligence claim and without deciding the merits of any other limitations issues.

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1 IT IS FURTHER ORDERED that Plaintiff's Amended Complaint is dismissed for
2 failure to comply with Rule 8(a)(2) with leave to file a further amended complaint by
3 October 26, 2005.

4 DATED this 11th day of October, 2005.

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Neil V. Wake
United States District Judge
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